

EXHIBIT A

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

CHRISTINE SARACENI,

Plaintiff,

Case No. 1:19-CV-1152
(LJV)

vs.

October 28, 2019

M&T BANK CORPORATION,

Defendant.

**TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

HAGERTY & BRADY
BY: DANIEL J. BRADY, ESQ.
MICHAEL A. BRADY, ESQ.
69 Delaware Avenue
Suite 1010
Buffalo, New York 14202
For the Plaintiff

HODGSON RUSS, LLP
BY: JODYANN GALVIN, ESQ.
MARTHA M. PIGOTT, ESQ.
140 Pearl Street
Buffalo, New York 14202
For the Defendant

LAW CLERK:

REBECCA F. IZZO, ESQ.

DEPUTY CLERK:

COLLEEN M. DEMMA

COURT REPORTER:

ANN M. SAWYER, FCRR, RPR, CRR,
NYRCR, NYACR, Notary Public
Robert H. Jackson Courthouse
2 Niagara Square
Buffalo, New York 14202
Ann_Sawyer@nywd.uscourts.gov

1 (Proceedings commenced at 2:01 p.m.)

2 THE CLERK: All rise. United States District Court
3 for the Western District of New York is now in session, the
4 Honorable Lawrence J. Vilardo presiding.

5 THE COURT: Please be seated.

6 THE CLERK: 19-CV-1152, Saraceni versus M&T Bank
7 Corporation.

8 Attorneys Daniel J. Brady and Michael A. Brady
9 appearing on behalf of the plaintiff.

10 Attorneys Jodyann Galvin and Martha Pigott appearing
11 on behalf of the defendant.

12 This is the date set for an oral argument.

13 THE COURT: Okay. Why doesn't whoever is going to
14 argue come up to the respective podiums and we'll talk.

15 Good afternoon. So let me ask Ms. Galvin first. I
16 want to make sure that I have the universe of -- of documents
17 and the universe of issues, I have my head wrapped around
18 them.

19 So the emails that we're talking about or the lists
20 that we're talking about, there are five emails but really
21 four lists, right?

22 MS. GALVIN: That's correct.

23 THE COURT: Okay. The first is a list that the
24 plaintiff claims was a potential customer, or something that
25 she prepared for M&T to send out when she started her

1 employment, you know, a "guess where I'm working now, and come
2 and get your mortgage from M&T."

3 MS. GALVIN: That's correct.

4 THE COURT: That's number one.

5 MS. GALVIN: That's marketing list.

6 THE COURT: Okay. Number two is a list that looks
7 like it may have been culled from that, that the plaintiff
8 claims was a list of names that's -- that was a wedding
9 invitation list. But -- but the names and addresses on that
10 list appear to have come from the other list.

11 MS. GALVIN: It appears to be a subset, Your Honor,
12 yes.

13 THE COURT: A subset. That's a much better way of
14 saying it, thank you.

15 The third list is a list of top attorneys and
16 accountants and investment advisors and things like that that
17 apparently was not prepared by the plaintiff herself, although
18 there seems to be some dispute about that. I think the
19 plaintiff is saying that you don't really -- there's some
20 indication that it was prepared by somebody else and perhaps
21 revised by the plaintiff in your papers, but you don't really
22 make that point explicitly, and I think that the plaintiff is
23 calling you on that. Do I have that correct, basically?

24 MS. GALVIN: That's basically correct, Your Honor.

25 THE COURT: Okay.

1 MS. GALVIN: We have a dispute about the substance of
2 that list.

3 THE COURT: Okay. And then the fourth list is the
4 one that everybody agrees on, and that's the -- the -- I've
5 forgotten what it's called. It's the reverse.XLSX chairman's
6 club list, and that includes some financial information,
7 some -- some employee information with respect to the
8 department where the plaintiff worked.

9 MS. GALVIN: That's correct.

10 THE COURT: Okay. That's the universe of documents
11 that we are talking about, and those are the universe of
12 violations that the plaintiff supposedly committed; is that
13 right?

14 MS. GALVIN: That is the universe, Your Honor.

15 THE COURT: Okay. And let me ask you, Mr. Brady, the
16 harm that you're complaining about is simply -- all that M&T
17 did to your client was deny her her health insurance, and that
18 has since been reversed. What we're talking about the health
19 insurance, and that's it, right?

20 MR. BRADY: And, Judge, are we talking about the --
21 our motion for the preliminary injunction, or the motion to
22 seal.

23 THE COURT: Well, I want -- I'm thinking about the
24 entire case. What are your damages. If you win this case,
25 what will you be entitled to in damage?

1 MR. BRADY: She would be entitled to her health
2 insurance benefits, and --

3 THE COURT: Through -- through November 22nd?

4 MR. BRADY: Through November 22nd.

5 THE COURT: Okay.

6 MR. BRADY: Together with 18 months of coverage under
7 COBRA.

8 THE COURT: COBRA, though, as I understand, she would
9 have to pay for that herself.

10 MR. BRADY: Right. But it would be administered
11 through M&T.

12 THE COURT: Yep, okay.

13 MR. BRADY: And her salary, 17 weeks of salary. I
14 think there are some other benefits involved in the severance
15 pay program. There's an employment assistance program, so
16 whatever the value of that would be.

17 THE COURT: Okay.

18 MR. BRADY: And --

19 THE COURT: So there are -- there are other items of
20 damage besides --

21 MR. BRADY: Right.

22 THE COURT: -- the insurance.

23 MR. BRADY: Right. And as well as the statutory
24 penalties.

25 THE COURT: Okay. Yeah. Okay. So, now let's talk

1 about -- so I think I have the -- the -- the universe of
2 issues in my head now, and that was the first thing I wanted
3 to clarify.

4 Let me ask you this, Mr. Brady. If she prepares this
5 list for M&T to send to potential customers -- so, she's hired
6 by M&T. And M&T says to her, put together a list of people
7 who you know who we should send a postcard to to try to get
8 their business, and she sits down and puts that list together.

9 Setting aside the confidentiality, which I have other
10 questions about, why isn't that M&T's property? She prepared
11 the list while she was employed by M&T, presumably on M&T's
12 time. Why isn't that list M&T's property?

13 MR. BRADY: Right. And I think to answer that, Your
14 Honor, the first point would be that there's actually no
15 evidence that that's what the list was prepared for.

16 THE COURT: Isn't that what you say it was prepared
17 for?

18 MR. BRADY: No, it was prepared to -- a list of
19 family and friends to send a look-who-joined postcard. And
20 that's what we've described it as, and that's what M&T's
21 employee, Ms. Harrington, has described it as. So there's
22 actually no evidence that it was submitted for an express
23 purpose of gaining these individuals' business.

24 THE COURT: Why else would she send -- why else would
25 M&T want her to send a list -- send a postcard like that?

1 MR. BRADY: I don't know, Your Honor. M&T could
2 explain that. But all they've said is it was sent to announce
3 her employment to friends and family.

4 THE COURT: Well, regardless of the reason that they
5 sent it, if they asked her to put together a list for a
6 postcard that we would like to send out, regardless of whether
7 it means business for us or not, why isn't that -- and she
8 then prepares that while she's employed by M&T, presumably --
9 she was a salaried employee, right?

10 MR. BRADY: Right..

11 THE COURT: So presumably while she's being paid a
12 salary by M&T she is putting together this list, she does it
13 on an M&T computer and then it gets sent out to her family and
14 friends, who cares why M&T wanted her to do it? Why isn't
15 that M&T's property? She did it at the request of her
16 employer for whatever purpose her employer wanted her to do
17 it.

18 MR. BRADY: Right. And I think the answer would be,
19 Your Honor, that all we have to do is look to the cases and
20 what New York law is on what a protectable customer list is,
21 and --

22 THE COURT: I'm not talking about protectable, I'm
23 not talking about confidentiality. I think I may agree with
24 you on the question of confidentiality.

25 I'm asking why isn't that list -- so -- so now she

1 goes to a new employer, okay? And the new employer says I'd
2 like you to do a list of friends and family that I'd like to
3 send a postcard of where I'm working now. And she says oh,
4 I've got one already, it's on M&T -- she downloads that.

5 She can't do that. That's M&T's list. She can
6 prepare that list again, she can do exactly what she did for
7 M&T again and sit down and put together a list, and it can be
8 an identical list, which is why I have some issues with
9 respect to the confidentiality question. But she doesn't get
10 to use that very list that she got paid by M&T for preparing,
11 right? She can't take that list --

12 So, and let's go back to the days before computers.
13 She couldn't take that piece of paper that belonged to M&T,
14 that was -- that M&T paid for on the paper, and that M&T paid
15 for the typewriter ink that went on that paper, and that M&T
16 paid her to put that list together. She can't take that paper
17 and go over to her new employer and give that paper to them.

18 So why can she download this list that's on a
19 computer that she -- that she prepared and got paid to prepare
20 by M&T?

21 MR. BRADY: Well, I think that there's a couple
22 issues to address. The first is there's been some kind of
23 argument about the ownership of the file itself. And this is
24 in the record because there's actually been no opportunity to
25 put it in the record yet, but this is a Microsoft Excel

1 spreadsheet, and whether it's at Hagerty & Brady or on the
2 Court's computers or on M&T's computers or Hodgson Russ's
3 computers, Microsoft License licenses its software. And it
4 says right in the licensing agreement you do not own this
5 software. You have a license to use it, and you may be able
6 to own the information that's in it, but you do not own the
7 software.

8 So if the question is because M&T owned the
9 spreadsheet itself, it doesn't matter what the information is
10 in it, that's actually --

11 THE COURT: But the -- but the information is in -- I
12 mean, I'm not a computer expert so I'm at a real disadvantage
13 here, but the information is electronically in the M&T system
14 on a Microsoft Excel spreadsheet. It's not in the Hagerty &
15 Brady system.

16 I can't go into my Microsoft Excel and print the
17 plaintiff's list or M&T's list just because I have Excel.
18 There's a little electronic doohickey that's in the computer
19 that -- that is that list, right? And that's in M&T's
20 computer. It's not in Hagerty & Brady's computer, it's not in
21 the United States District Court's computer, and it's not in
22 your client's computer, it's in the M&T computer, that little
23 electronic doohickey, and that belongs to M&T, right?

24 MR. BRADY: Well, I think the answer is that the only
25 thing that could belong to M&T is the information in that

1 list. And --

2 THE COURT: No. The list belongs to M&T.

3 MR. BRADY: But I -- Your Honor, that -- it can't.
4 It belongs to Microsoft.

5 THE COURT: No, the software belongs to Microsoft.

6 MR. BRADY: Right. And the only -- so there are two
7 things making up the spreadsheet. There's the underlying
8 software, and then there's the information that's on the
9 software. Microsoft owns the software, and under state law,
10 nobody can own the information that's on that software because
11 it's publicly available.

12 THE COURT: Well, you're right, they can't own the
13 information, but they can own the electronic doohickey that
14 includes the information that's on the software. So I think
15 you're missing one part of the ownership here. I think that
16 there's software, there is electronic information -- and,
17 again, I'm not a computer guy, but this is, you know, this is
18 a -- an old paper guy trying to figure out how -- how computer
19 stuff works.

20 So there's a -- there's software on the computer, and
21 there is an electronic version of information. So you can't
22 own the information because the information is not in any kind
23 of electronic form, it's just out there. Information is just
24 out there. That's not -- that's not something -- that's not a
25 tangible something. But there's a little piece of electronics

1 on the software that is the information. That's what they
2 own. Not the information itself, because, you're right, you
3 can't own information, you can go home and prepare that same
4 list. But they can own that little piece of electronic
5 information, that little piece of electronics on which the
6 information is on the software that M&T has the ability to use
7 because they have the license from Microsoft. Why am I wrong?

8 MR. BRADY: I think that -- that -- I think we're
9 missing, Judge, that perhaps if she had interfered with M&T's
10 ability to access that file --

11 THE COURT: She took it, she took it.

12 MR. BRADY: It's analogous to -- but she didn't take
13 it, she sent a copy of it. It's analogous to if she made a
14 Xerox copy of it.

15 THE COURT: But I -- I'm going to agree with that,
16 yeah, it's analogous to her making a Xerox copy using the M&T
17 Xerox machine and the M&T paper and the ink and the Xerox
18 machine that M&T owned. It's analogous to her taking that and
19 giving it to somebody else. Yeah, I think I would agree that.
20 I think I would agree that.

21 And that's where you're losing me on why this doesn't
22 belong -- the list doesn't belong to M&T. Again, not the
23 information, she can go home, sit down and do exactly for M&T
24 or do exactly for her new employer what she did for M&T, that
25 is, make this list up all over again.

1 What I don't think she can do is take the list and
2 give it to her new employer or give it to her husband's
3 employer or give it to whoever she wants. That's -- that's
4 where you're losing me on this argument.

5 MR. BRADY: Well I guess, Your Honor, I just -- I'm
6 not following, because there's really only two items that
7 could possibly be considered property. One is the file
8 itself, which is a piece of Microsoft software.

9 THE COURT: No. I disagree with that. The other one
10 is the information.

11 MR. BRADY: And the other one --

12 THE COURT: I think you're wrong. I think you're
13 wrong. I think there are three things. There's the
14 information that's out there. Then there is the Microsoft
15 software that without the information in it is just software,
16 it's a spreadsheet that has blank things in it.

17 Then you input this stuff into that stuff, and it
18 comes up with a list. And that piece of electronics is the
19 third thing that you're trying to ignore. And that's what I
20 think M&T owns.

21 MR. BRADY: Your Honor, I'm not following how the
22 third thing is different from the information that's just
23 entered into the spreadsheet.

24 THE COURT: Because information is a complete
25 intangible. It's something that's out there. It's something

1 that's in my head.

2 What's on the computer is different than what's in my
3 head, or in Ms. Pigott's head, or in your head, or in your
4 dad's head. Information is out there. Information -- there's
5 nothing tangible about information. Information is out there.

6 The information becomes tangible when you make it
7 something electronic on the computer.

8 Information becomes tangible when I type it on a
9 piece of paper.

10 Information becomes tangible when I write on a piece
11 of paper.

12 These ideas on this piece of paper that I have in
13 front of me, that's the information. That's not property.
14 But when I write it down, it sure as hell is. And this is my
15 property. This is mine.

16 MR. BRADY: I agree, Your Honor. And I think that
17 the distinction here is that as a matter of state law we say
18 that can be true, that information that you put into a
19 document can be a protectable property right of an employer.
20 But in this case, what cases say is if it's not -- if it's
21 something that's publicly available, if it's not the product
22 of years of hard work and time and expense, then it's not a
23 protect -- a property interest cannot arise in that
24 information.

25 And I think it's also important to point out that

1 what we're talking about is actually totally distinct from the
2 reason M&T gave for terminating her benefits. And the
3 question under ERISA is was the reason incorrect, not can we
4 justify it after the fact.

5 THE COURT: Okay. Let me ask you this. Your motion
6 for a preliminary injunction is now moot, right? They're
7 covering her through the end of November. You say that you
8 haven't gotten the COBRA notice yet, if they send her the
9 COBRA notice and she gets to elect COBRA by the end of
10 November, your motion is moot, right?

11 MR. BRADY: It's not, Your Honor. Because when we
12 first came in, we brought a motion for a TRO to restore her
13 health insurance. M&T said, or basically conceded the relief
14 said we'll restore it to September while we work this out.

15 Then we came in here again on September 11th, and the
16 agreement made on the record was that M&T would restore her
17 health insurance until possibly November 30th strictly to
18 allow briefing and decision on this motion.

19 So, if the Court denies the motion, then M&T will be
20 free to terminate her health insurance at any time. And that
21 was the express agreement that the parties entered into on the
22 record. So --

23 THE COURT: If she gets her health insurance through
24 November 22nd, and gets her COBRA rights at November 22nd,
25 your motion for preliminary injunction will be moot, right?

1 MR. BRADY: It actually wouldn't be, because her
2 COBRA notice should have been delivered some months ago and
3 she's still entitled under the law to --

4 THE COURT: So what -- tell me what a preliminary
5 injunction would be.

6 MR. BRADY: It would just be the restoration of her
7 health insurance benefits as they're --

8 THE COURT: Which she has.

9 MR. BRADY: Which she has, only subject to -- only to
10 allow briefing of this motion.

11 THE COURT: No, no, no. You're not answering my
12 question.

13 So I'm saying I reserve decision on the motion.
14 November 22nd comes and goes. M&T, between now and
15 November 22nd, sends her a COBRA notice. She then applies for
16 and gets COBRA. As of November 23rd, your motion for a
17 preliminary injunction would then be moot.

18 MR. BRADY: I guess so, Your Honor.

19 THE COURT: Okay.

20 MR. BRADY: But the reason we're here is because the
21 only reason the health insurance has been extended is to allow
22 briefing in this motion.

23 THE COURT: I understand. I understand.

24 Okay. Tell me why this information is confidential.
25 I understand why -- I understand your argument that it's

1 proprietary. Tell me why it's confidential.

2 MS. GALVIN: Well, I'll start with the document that
3 Your Honor was focused on, marketing list, which is the Excel
4 spreadsheet of over 300 names.

5 That information is, in fact, confidential because it
6 was a compilation created for M&T's business purposes.
7 Together, as a whole, that list is a confidential list.

8 Each entry on its own? Absolutely not. We could
9 never take the position that Joe Brown's name and address is
10 somehow confidential information.

11 THE COURT: But you agree with me, she can go and
12 compile that exact list tomorrow.

13 MS. GALVIN: That's what happens, Your Honor, when
14 people want to take information from their current employers
15 when they leave. They memorize things. They go use the
16 phonebook. They use Google.

17 Ms. Saraceni has shown this Court that she knows how
18 to use the library. So she could very easily recreate it, and
19 there's nothing we can do to stop her.

20 THE COURT: So, again, why is the list conf -- so,
21 again, I get the proprietary argument, I'm still not following
22 the confidential argument.

23 MS. GALVIN: The confidential argument, Your Honor,
24 is based on the fact that there are M&T customers on that
25 list.

1 THE COURT: There are some, yeah.

2 MS. GALVIN: There are some.

3 THE COURT: Yes.

4 MS. GALVIN: There are some.

5 THE COURT: There are some that are not M&T
6 customers.

7 MS. GALVIN: That's absolutely correct.

8 THE COURT: Okay.

9 MS. GALVIN: There's no dispute.

10 THE COURT: So if I ordered the M&T customers to be
11 redacted from that list, would that -- would that satisfy you?

12 And they're not identified as M&T customers, are
13 they, on the list?

14 MS. GALVIN: They are not.

15 THE COURT: It's just a list.

16 MS. GALVIN: They are not identified.

17 THE COURT: So, again, I'm still not following -- I'm
18 not following -- you're losing me on this argument.

19 MS. GALVIN: Yep. Well --

20 THE COURT: The confidentiality argument.

21 MS. GALVIN: That's the basis of the argument, Your
22 Honor, is that the compilation, as a whole, is confidential
23 information that belongs to M&T.

24 THE COURT: Okay.

25 MS. GALVIN: But what really is key is belongs to

1 M&T.

2 THE COURT: Proprietary.

3 MS. GALVIN: Yes.

4 THE COURT: Yeah, I understand that. I get that.

5 MS. GALVIN: Yep.

6 THE COURT: I get that.

7 Let's talk about the wedding list. If that's really
8 just a wedding list, if that subset of the big list is really
9 just a list of people that she took from -- I mean, and it
10 seems like a reasonable thing to do. I was talking with my
11 law clerks, and we did something very similar here when my
12 kids got married and -- and culled from a larger list, lists
13 of people who we wanted to invite to the wedding. If that in
14 fact is the case, you don't think that is proprietary or
15 confidential, right?

16 MS. GALVIN: Well, following your Your Honor's logic,
17 it would not be confidential. I do think it's proprietary.

18 THE COURT: Because she did it on M&T time
19 presumably?

20 MS. GALVIN: She did it on M&T time. She created --

21 THE COURT: How do we know -- what if the facts come
22 out that she actually don't it on M&T time, that she probably
23 had access to her computer when she was home, right?

24 So she did it at home -- or, she stayed late one
25 night. She stayed until 7:00 one night because her son or

1 daughter or whoever was getting married said, look it, Mom,
2 we've got to get this list together. And she said okay, I've
3 got a good way to do it, I'll stay late at work tonight and do
4 it.

5 MS. GALVIN: I don't think that helps the argument,
6 Your Honor, and the reason is --

7 THE COURT: Why?

8 MS. GALVIN: The reason is the information security
9 policy, which Ms. Saraceni was subject to and acknowledged,
10 that anything created on an M&T system belongs to M&T.

11 Now you could argue that there's a different value to
12 something like a wedding list, or a grocery list that you may
13 create on Microsoft word, or a list of appointments that you
14 have to attend to of a medical nature that you create on your
15 work computer.

16 But the bottom line is the policy of M&T is that that
17 belongs to M&T. Now, would M&T necessarily enforce its policy
18 for something that's a wedding list? Probably not.

19 THE COURT: Okay. Let's talk about -- do we all
20 agree that that list, the chairman's club reverse.X1SX or
21 whatever the heck it is list, do we all agree that that is
22 both proprietary and confidential?

23 That that is something that does belong to M&T and --
24 and that is confidential, as well?

25 MR. BRADY: We agree that it should be sealed. I

1 will note that there's no, despite the kind of blurry
2 approach, there's actually no allegation that she sent that to
3 anybody, just to herself.

4 THE COURT: I understand that.

5 MR. BRADY: Yeah.

6 THE COURT: I get that. But you would agree that
7 that list is M&T's property, and that that list is
8 confidential?

9 MR. BRADY: That the information contained in there
10 is confidential, yes.

11 THE COURT: The information contained in there is
12 confidential, and the list is M&T's property.

13 MR. BRADY: I would agree that the information
14 contained in the list is M&T's property.

15 THE COURT: Okay. Okay. I understand. And you're
16 being careful because of the first set of questions that I
17 asked, and I get that, okay. So that one, that part is easy
18 at least with respect to the sealing.

19 What about the -- the list of top lawyers and top
20 investment advisors and accountants and the like?

21 MR. BRADY: Yeah. And on this one, Judge, the first
22 question is, and I -- my first question is I'm not sure
23 what -- what motion we're referring to.

24 THE COURT: So let's -- let's talk about the sealing
25 motion right now.

1 MR. BRADY: Okay. On the question of sealing, my
2 first point would be rule 5.3 on showing a substantial showing
3 of evidence that necessitates sealing. So, the first question
4 is what is the evidence.

5 And from M&T, we actually don't have any admissible
6 proof. We have hearsay testimony from Ms. Harrington who
7 admits that she wasn't involved in the creation or use of the
8 document, and just says -- just kind of recites the elements
9 of a protectable customer list under New York State Law.

10 And we do have firsthand --

11 THE COURT: But that's not a customer list. That's
12 not a customer list. I'm not talking about a customer list,
13 I'm not talking about the -- the spreadsheet.

14 MR. BRADY: Right.

15 THE COURT: I'm talking about the list of best
16 lawyers, best accountants, best investment advisors. I forget
17 what the other things were on that list.

18 MR. BRADY: Right. And, Your Honor, with respect to
19 that list in particular, what I'm saying is that there
20 actually is no evidence submitted by M&T, admissible evidence,
21 about why that list needs to be protected. All that we have
22 is hearsay testimony from Ms. Harrington.

23 And on the other side, we have testimony from my
24 client who has personal knowledge and says this is the list
25 that we use from publicly-available information. And --

1 THE COURT: But so what if it -- I mean, there's a
2 lot of publicly-available information that becomes
3 confidential and custodial when people do things with that
4 information.

5 So, if I -- if I put together a list of law firms
6 that I -- that I use. I have a company, and I go and I get
7 all sorts of public information, and I put together a list of
8 law firms that I use. That is potentially confidential
9 information, isn't it?

10 If a competitor got ahold of that and knew that they
11 were going to be in litigation with me, a very wealthy and a
12 very smart competitor might immediately call every single one
13 of those law firms and conflict them out of representing me in
14 a case. So that certainly is confidential information, even
15 though it all came from publicly-available stuff.

16 MR. BRADY: Well, Your Honor, I'd say it depends on
17 what the cases say it depends. And the 2nd Circuit says in
18 American Institute of Chemical Engineers v Reber-Friel, 682
19 F.2d 382, a customer list is not confidential where the past
20 or prospective customers are readily ascertainable from
21 sources outside the employer's business.

22 THE COURT: This isn't a customer list, Mr. Brady.
23 This is a list of -- I'm talking about law firms now that I
24 use to represent me.

25 On this list that we're talking about, the one

1 document that I'm talking about right now are not customers,
2 they are vendors that M&T uses for accounting, for legal
3 representation, for money management, for things like that.

4 We're not talking about a customer list, so that case
5 that you're citing to me is inapposite.

6 MR. BRADY: Well, Your Honor, I would say that --
7 that there's no evidence that M&T uses that list or those
8 firms for the reasons that you just said. All we have is that
9 this list was used to send a postcard about where those
10 establishments may refer a potential client who is interested
11 in a reverse mortgage. That's the only evidence there is.

12 So there's no evidence that M&T used these law firms,
13 used these money manager firms, and the -- the -- the point I
14 think we're all missing here, Judge, is that in order to be a
15 protectable trade secret or protectable customer list under
16 New York State law, something has to be the product of time
17 and expense that was tightly controlled within the business
18 that was used to do a specific thing. And in this case, that
19 specific thing was selling reverse mortgages.

20 What is M&T not doing anymore? Selling reverse
21 mortgages.

22 And we have an M&T's own submission, Exhibit E to the
23 Harrington declaration. She sent out a letter to every
24 employee in the department with a list of other banks that
25 they should refer clients who get ahold of them to.

1 So the idea that M&T is being hurt because they're
2 still in this business, and now their documents are out there,
3 is just not consonant with reality because M&T 00100 is the
4 document, and we know from their own document, hey, if a
5 client gets ahold of you about a reverse mortgages, here are
6 these other places you should send them to.

7 So even if we -- so even if we accept that there
8 actually is some admissible proof of a protectable customer
9 list, which there isn't, even if there were, a customer list
10 would only be -- have been made to do one thing, and they're
11 not doing that anymore.

12 THE COURT: Well, if it was a customer list that we
13 were talking about, we're not talking about a customer list, I
14 would agree with you. But we're not talking about a customer
15 list. We're talking about something completely different than
16 a customer list. We're talking about, again, law firms,
17 accounting firms and the like, not a customer list.

18 Tell me -- tell me why the law firms and the customer
19 list is confidential. Did I say customer list? I meant law
20 firms.

21 MS. GALVIN: I think it's called top firms.

22 THE COURT: Yeah, top -- it's top firms in a number
23 of different areas, right?

24 MS. GALVIN: Right. Right. There's brokerage firms,
25 insurance, law firms and accounting firms in that list. And

1 Your Honor, as Ms. Harrington recited in her declaration,
2 these are firms where M&T would have strategic partnerships
3 with particular regional professionals. This is just the
4 Rochester region that that list represents. So --

5 THE COURT: M&T would have strategic partnerships
6 with respect to reverse mortgages, or generally?

7 MS. GALVIN: Generally speaking.

8 And as Ms. Saraceni recognizes, it was used for mail
9 merges to send out information to these particular contact
10 persons.

11 I think what's kind of being glossed over here, and
12 if I may take a minute here, Your Honor, Ms. Saraceni
13 represents that this was a direct copy of a publicly-available
14 document that she got from the library, and that's not
15 correct. This is -- has unique changes that were made by M&T
16 personnel to suit M&T's business.

17 So it wasn't a wholesale copy job as she would like
18 this Court to believe. It was, perhaps, assuming, we'll
19 credit her version of events that she used a
20 publicly-available source to begin the list on M&T time with
21 M&T resources, and then it was edited over time. And there's
22 no explanation for those differences from Ms. Saraceni.

23 THE COURT: Let me ask you, Mr. Brady, why can't I,
24 based on the representations of the defendant, find that these
25 are confidential business documents that will be sealed

1 pending the resolution of the factual issues that we're
2 talking about?

3 So -- so you say that this was a list that your
4 client copied from publicly-available information, M&T says
5 it's not. M&T says it's confidential because these are its
6 go-to people for the Rochester region. You say that's not so.

7 Why can't I seal these pending resolution of factual
8 issues that need to be resolved in order to decide whether
9 they are ultimately confidential?

10 So, similar to a trade secret case. One side these
11 are trade secrets, the other side says are not, and the Court
12 says we're going to seal it pending the determination of the
13 factual issues to decide the litigation ultimately, whether
14 they're trade secrets or not, why shouldn't I do that?

15 MR. BRADY: Well, Your Honor, the first point I would
16 make is just evidentiary. The question is what does the
17 evidence say. And with respect to Ms. Harrington's statement
18 about this document, it's not admissible evidence. It's based
19 on hearsay. And --

20 THE COURT: And I can't take hearsay into account in
21 granting equitable relief like this?

22 MR. BRADY: Well, under rule 5.3, the question is
23 substantial evidence, and --

24 THE COURT: That's not my question. My question is:
25 Can't I take hearsay evidence into account in granting

1 equitable relief?

2 MR. BRADY: I -- I -- I don't see why this Court
3 should entertain hearsay evidence from M&T, particularly
4 when --

5 THE COURT: Let me ask one more time. Can I take
6 hearsay evidence into account in determining equitable relief?

7 MR. BRADY: I don't know, Your Honor. But one point
8 I would add is the M&T employee, Ruth DiVeronica, who
9 participated with my client in assembling this list in 2010,
10 and who emailed her the chairman's club, is still an M&T
11 employee. We haven't heard from her. There's no reason M&T
12 couldn't have gotten a declaration from her to explain the
13 contents of this list.

14 So I don't think the Court should make an exception
15 for hearsay testimony when there -- we've got declarations
16 from three M&T employees, and they couldn't find a single one
17 personal knowledge of the actual contents?

18 THE COURT: Why don't we have somebody with personal
19 knowledge?

20 MS. GALVIN: Your Honor, Ms. DiVeronica is a
21 secretary. And, frankly, her conduct in providing
22 Ms. Saraceni with particularly the chairman's club is
23 questionable conduct. And it was not appropriate at the time
24 that we were doing this last week to seek a sworn statement
25 from her when, frankly, we don't need to. This isn't summary

1 judgment.

2 And the standard that Ms. Saraceni would like this
3 Court to adopt, not admissible, not admissible, not
4 admissible, full and final, this is not a hearing on the
5 merits where everything has to be in perfect form.

6 The Desmeth case from the Southern District,
7 University of Texas, the Supreme Court, recognized the
8 incredible amount of flexibility the Court has at preliminary
9 injunction. And the findings the Court makes at a preliminary
10 injunction hearing need not be binding on it later in a
11 proceeding, that the Court can reverse out and take a
12 different position once the merits have been fleshed out.

13 THE COURT: Let's talk about your preliminary
14 injunction motion. You want me to order her to return this
15 stuff to you, right?

16 MS. GALVIN: Yes.

17 THE COURT: That's the ultimate relief in this case,
18 too, isn't it? I mean, shouldn't -- let me ask you this: How
19 are you irreparably injured by her not returning this stuff to
20 you --

21 MS. GALVIN: Well, what we have learned about
22 Ms. Saraceni is that she has flouted her obligations to M&T by
23 taking things when she was expressly instructed not to.

24 THE COURT: Again, that's your view, and that's --
25 and this is what we're going to end up litigating in this

1 case. But tell me -- tell me again how have you been
2 irreparably injured. If you waited two months before you made
3 your motion for a preliminary injunction, tell me what is
4 going to change that will result in irreparable injury to M&T
5 if she doesn't return this stuff right away?

6 MS. GALVIN: This information is in the hands of
7 M&T's competitor.

8 THE COURT: But, again, the information --

9 MS. GALVIN: The documents themselves, not the
10 information therein, the documents themselves. And it would
11 put M&T in the position that it would have been had she abided
12 her obligations. And frankly, there's no harm to her because
13 she says that it can all be recreated.

14 THE COURT: Okay.

15 MR. BRADY: And, Your Honor, if I could just
16 respond to the --

17 THE COURT: Go ahead.

18 MR. BRADY: -- to M&T's motion for preliminary
19 injunction.

20 THE COURT: Yeah, please.

21 MR. BRADY: I really don't think it's properly before
22 the Court. It was brought without a pleading, and so under
23 Supreme Court precedent, it's jurisdictionally defective
24 because there's no basis for a preliminary injunction motion
25 if you don't have a pleading. And we have prepared opposition

1 without knowing what the claims were.

2 And as far as the claims themselves, we are going to
3 be making a motion to dismiss because, for one, there's no
4 jurisdictional basis alleged in the counterclaims which is a
5 first requirement under rule 8.

6 For another, the breach of contract claim is plainly
7 subject to a preemption under ERISA.

8 And the breach of loyalty claim doesn't even come
9 close to the elements under New York State law for a breach of
10 loyalty claim.

11 So we have real objections to hearing a preliminary
12 injunction motion at this time, because we don't think there's
13 any basis for a likelihood of success on the merits of those
14 claims, and we will be filing a motion to dismiss.

15 THE COURT: Okay. So you don't think, even though
16 you respond -- I know you made your motion for an expedited
17 hearing, which -- which I think is now moot, isn't it?

18 MS. GALVIN: I frankly don't know, Your Honor. I
19 apologize. There were so many schedules.

20 THE COURT: So what you're saying you want more time
21 to move to dismiss their motion for a preliminarily
22 injunction, or to respond to their motion for a preliminary
23 injunction because you don't think I have jurisdiction over
24 it?

25 MR. BRADY: Yes, Your Honor. But I've also stated

1 that because the motion to expedite hasn't been ruled on yet,
2 there's no, you know, our time to respond to the motion can
3 still be pushed out a little further.

4 THE COURT: Sure.

5 MR. BRADY: And the other thing I would add, Your
6 Honor, that I think may help things all around is with respect
7 to these -- I think it's four other documents in addition to
8 the original list. Those four other documents under ERISA
9 have no relevance to the ERISA claim.

10 So if they are -- if M&T's counterclaims are
11 dismissed, then they really have no relevance in this case at
12 all, and that would pretty much make the sealing issue
13 entirely moot.

14 THE COURT: Yeah, I was going to say the sealing
15 issue goes away, doesn't it?

16 MR. BRADY: Yes, it does.

17 THE COURT: Okay. How much time do you need to --
18 the motion for the expedited schedule is going to be denied.

19 MS. GALVIN: That's fine.

20 THE COURT: If it's not moot, it's going to be
21 denied.

22 MS. GALVIN: That's fine. We'll amend our cross --
23 our counterclaims.

24 THE COURT: So you want to do that first?

25 MS. GALVIN: We'll do that first.

1 THE COURT: How much time?

2 MS. GALVIN: A week.

3 THE COURT: A week. Colleen, please?

4 THE CLERK: That's November 4th.

5 THE COURT: November 4th.

6 How much time do you want to make your motion to
7 dismiss or respond to that?

8 MR. BRADY: I think two weeks is probably sufficient.

9 THE COURT: November 18th.

10 THE CLERK: November 18th.

11 THE COURT: And reply, November -- yeah, we don't
12 have Thanksgiving -- the 25th, because Thanksgiving is late
13 this year?

14 MS. GALVIN: Yes, that's fine. Thank you.

15 THE COURT: Great. And if I need oral argument, I
16 will ask for oral argument.

17 The plaintiff's motion for a preliminary injunction
18 I'm reserving on because I think that that is going to become
19 moot. If -- if you have need to send a COBRA notice, please
20 send a COBRA notice.

21 MS. GALVIN: Your Honor, if I might, just to clarify
22 the record because I didn't really have a chance to address
23 plaintiff's motion?

24 THE COURT: Yeah.

25 MS. GALVIN: Very briefly, we don't think there's a

1 controversy for the Court to hear given the extension of the
2 health care benefits through -- it's actually the end of
3 November that M&T agreed to.

4 So the two cases of relief that Ms. Saraceni was
5 seeking was that extension without the threat of a recoupment
6 by M&T, which I don't think is something the Court can award,
7 and I don't know what that means, really.

8 But, the second was issuance of a proper COBRA
9 notice. Well, Ms. Saraceni, by virtue of M&T reinstating the
10 day after she sued, no longer has a qualifying event until the
11 end of November at which time the COBRA notice will issue,
12 because --

13 THE COURT: Oh, is that right? You don't send a
14 COBRA notice until -- well, you have to send her a COBRA
15 notice sometime before the policy expires, do you? So that
16 she then knows --

17 MS. GALVIN: No.

18 THE COURT: -- what to do? No?

19 MS. GALVIN: No. What's required of an employer is
20 to give an upfront COBRA notice when somebody is onboarded
21 into a corporation or company that offers benefit packages.
22 Then, after a qualifying event, let's say termination of
23 employment, that qualifying event, someone like M&T has
24 44 days to issue a COBRA notice.

25 THE COURT: And what happens in that 44-day period,

1 if I get -- so --

2 MS. GALVIN: The coverage is lapsed and then
3 reinstated as soon as the person elects COBRA. So it's much
4 like what happened here, that the claimed harm that happened
5 in August where medical benefit was denied is just cleaned up.
6 That's how COBRA works.

7 THE COURT: Is she right?

8 MR. BRADY: Respectfully, no, Your Honor.

9 And COBRA, the COBRA law and regulations are --
10 there's a lot of them, but they're very specific. And a
11 qualifying event -- the only qualifying event at issue here is
12 termination of employment.

13 End of severance benefits is not a qualifying event
14 under COBRA under the regulations. It's just not one that's
15 defined.

16 And they actually express out in the regulations,
17 they give an example of an employee who has a severance
18 package. And the question is when is the qualifying event?
19 The qualifying event is the end of employment.

20 So under the regulations, there's kind of no wiggle
21 room. The qualifying event was July 26th, 2019. That was
22 when they required to give notice.

23 THE COURT: Is there any reason for M&T not to send
24 her a notice now?

25 MS. GALVIN: We will do that, Your Honor.

1 THE COURT: Thank you.

2 So, I fully expect the plaintiff's motion for a
3 preliminary injunction to become moot on November 22nd or
4 November 30 -- I mean, you've extended it to November 30th,
5 right? I think --

6 MS. GALVIN: I think that was accommodate briefing
7 and the Court's consideration and decision.

8 THE COURT: Yeah, but we have extended it until
9 November 30th.

10 MS. GALVIN: Yes.

11 THE COURT: Yes. So I think as of the 22nd, at
12 least, and certainly as of the 30th, once she gets that COBRA
13 notice, which I fully expect her to get before then,
14 plaintiff's motion for a preliminary injunction will become
15 moot. If that's not the case, then you folks can let me know.

16 But I'm going to reserve on the plaintiff's motion
17 for a preliminary injunction. I'm going to reserve on the
18 sealing issue, and keep the sealing in place right now until I
19 resolve that.

20 And then we've got a briefing schedule with respect
21 to the defendant's motion for a preliminary injunction.

22 Anything else we need to do this afternoon?

23 MS. GALVIN: Not from M&T's perspective.

24 MR. BRADY: No, Your Honor.

25 THE COURT: Okay. Thank you, all, very much.

1 MS. GALVIN: Thank you.

2 MR. BRADY: Thank you, Judge.

3 (Proceedings concluded at 2:47 p.m.)

4 * * * * *

5

6

7

8

9

10

11

12

13

14

15

16

CERTIFICATION

17

18

19

20

I certify that the foregoing is a
correct transcription of the proceedings
recorded by me in this matter.

21

22

23

24

25

s/ Ann M. Sawyer
Ann M. Sawyer, FCRR, RPR, CRR,
NYRCR, NYACR, Notary Public
Official Reporter
U.S.D.C., W.D.N.Y.